PUBLIC VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DIRECTV, LLC AND AT&T SERVICES, INC., Complainants, v. DEERFIELD MEDIA, INC., DEERFIELD MEDIA (PORT ARTHUR) LICENSEE, LLC, DEERFIELD MEDIA (CINCINNATI) LICENSEE, LLC, DEERFIELD MEDIA (MOBILE) LICENSEE, LLC, DEERFIELD MEDIA (ROCHESTER) LICENSEE, LLC, DEERFIELD MEDIA (SAN ANTONIO) LICENSEE, LLC, GOCOM MEDIA OF ILLINOIS, LLC, HOWARD STIRK HOLDINGS, LLC, HSH FLINT (WEYI) LICENSEE, LLC, HSH MYRTLE BEACH (WWMB) LICENSEE, LLC, MERCURY BROADCASTING COMPANY, INC., MPS MEDIA OF TENNESSEE LICENSEE, LLC, MPS MEDIA OF GAINESVILLE LICENSEE, LLC, MPS MEDIA OF TALLAHASSEE LICENSEE, LLC, MPS MEDIA OF SCRANTON LICENSEE, LLC, NASHVILLE LICENSE HOLDINGS, LLC, KMTR TELEVISION, LLC, SECOND GENERATION OF IOWA, LTD, AND WAITT BROADCASTING, INC., Defendants.	MB Docket No. 19-168 CSR-8979-C

REPLY IN SUPPORT OF DIRECTV, LLC AND AT&T SERVICES, INC.'S
COMPLAINT FOR DEFENDANTS' FAILURE TO NEGOTIATE IN GOOD FAITH

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August 23, 2019

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DIRECTV, LLC ("DIRECTV") and AT&T Services, Inc. ("U-verse," and with DIRECTV, "AT&T"), pursuant to 47 C.F.R. § 76.7(c), hereby reply to the August 6, 2019 Answer of the above-captioned defendants ("Defendants" or the "Station Groups") to AT&T's good-faith Complaint.[1]

SUMMARY

Defendants seek to characterize this case as a dispute about the ability of nine small, isolated broadcast station groups **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** against AT&T. No aspect of that characterization is correct. As an initial matter, these purportedly independent entities are in fact managed and controlled by Sinclair Broadcast Group ("Sinclair"), one of the nation's largest broadcasters, and the retransmission consent fees they are seeking to extract **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** – at consumer expense.

Even more to the point, contrary to Defendants' assertions, AT&T's legal claim is not that the Station Groups **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** It is that they each *refused* to negotiate for carriage of their stations, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** at any point before their existing retransmission consent agreements expired. The Station Groups used a **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** as a go-between with AT&T, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** did not actually negotiate for these parties, did not respond at a reasonable time, and in fact was used to **[BEGIN CONFIDENTIAL]** [redacted]

[1] AT&T's request to extend the due date for this reply to August 23, 2019, was granted by email from Mr. Lyle Elder to counsel for the parties on August 9, 2019.

[redacted] **[END CONFIDENTIAL]** to provide Defendants an unfair advantage.

The Station Groups' claim that the Commission has sanctioned these tactics rests on the deeply flawed premise that anything station groups do **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** – even refusing to negotiate **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** – is permissible. The Commission has said no such thing. The Commission's good-faith negotiation rules and orders apply with equal force to broadcasters claiming to **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** A contrary rule would create an unintended bad-faith safe harbor for the Station Groups and others relying on **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** to avoid the requirements to negotiate in good faith, leading inevitably to consumer harm.

At the end of the day, the relevant Commission *per se* rules are clear and undisputed. Broadcasters are not allowed (i) to refuse to negotiate or respond to proposals[2] or (ii) to refuse to negotiate at reasonable times or to unreasonably delay.[3] Nor is there any reasonable dispute that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** is a separate failure to bargain in good faith under the totality-of-the-circumstances test.[4] The Station Groups have done all of these things, and they do not even seriously dispute the core facts establishing as much.

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[2] *See* 47 C.F.R. § 76.65(b)(1)(i), (v).

[3] *See id.* § 76.65(b)(1)(iii).

[4] *See id.* § 76.65(b)(2); **[BEGIN CONFIDENTIAL]** [redacted]

The facts show that the Station Groups refused to discuss so much as a single term in their own agreements until after nearly all their stations had gone dark. In this regard, the Station Groups do not dispute that AT&T made multiple proposals to each of them and that they never responded to those proposals. They also do not dispute their failure to propose any alternative terms of their own for retransmission of their stations. Defendants claim (at 18-19) that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** concerning carriage of "Defendants' stations," but they cannot point to *any* pre-blackout proposal that includes *any* of their stations.

The undisputed facts thus do not show **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Rather, they show a failure to negotiate. Only **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** AT&T were negotiating (despite AT&T's attempts to negotiate with Defendants), which explains why **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** but Defendants still do not. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** The Station Groups thus violated

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[redacted] **[END CONFIDENTIAL]** *see also* Memorandum Opinion and Order, *Ryder Commc'ns, Inc. v. AT&T Corp.*, 18 FCC Rcd 13603, ¶ 28 (2003) (recognizing "the strong public interest in preserving the sanctity of contracts").

the *per se* rules against refusing to negotiate and failing to respond to proposals from the other party. *See* 47 C.F.R. § 76.65(b)(1)(i), (v).

The facts likewise show that the Station Groups refused to negotiate "at reasonable times" and acted "in a manner that unreasonably delay[ed]" negotiations. *Id.* § 76.65(b)(1)(iii). In assessing reasonableness, the Commission considers "the proximity of the termination of retransmission consent and the consequent service disruptions to consumers." First Report and Order, *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445, ¶ 42 (2000) ("*Good-Faith Order*"). Despite AT&T **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Defendants guaranteed there would be disruptions by refusing to discuss carriage of *their* **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** at any point before they went dark, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Again, the Answer does not dispute the key facts underlying these allegations, which establish Defendants' liability.

In addition to these *per se* violations, the Station Groups have acted in bad faith under the totality of the circumstances. Defendants casually dismiss (at 24) AT&T's concerns as "commonplace disagreements" over "substantive terms." That obviously is not – and could not be – AT&T's concern, because Defendants never put forth terms in the first place. As AT&T alleged, its concern is that, despite AT&T's vigorous **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** the Station Groups **[BEGIN CONFIDENTIAL]** [redacted] **[END**

CONFIDENTIAL] Indeed, the Station Groups' **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** conduct that certainly amounted to a violation of the good-faith rules and likely amounted to an actionable tort (tortious interference). Notably, Defendants do not even dispute the fact **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** is not commonplace in good-faith negotiations; it is "outrageous" and thus impermissible under the totality-of-the-circumstances test. *Good-Faith Order* ¶ 32; *see* 47 C.F.R. § 76.65(b)(2).

Unable to deny **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** the Station Groups make the absurd argument (at 25-26) that the Commission cannot consider misconduct by the Station Groups'**[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** This argument ignores that Defendants' own actions **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** – are squarely at issue and establish bad faith. In any event, Defendants cite no precedent establishing the improbable rule that the conduct of a parties' **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** cannot be considered. Basic principles of **[BEGIN CONFIDENTIAL]** [redacted] **[END**

CONFIDENTIAL] – long recognized by the Commission[5] – **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** a "totality of the circumstances" test by definition includes these critical details of AT&T's negotiations (or lack thereof) with Defendants. *See* 47 C.F.R. § 76.65(b)(2).

Defendants' other justification for **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** – is just as baseless. As an initial matter, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** as it does now. But even assuming circumstances are the same **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** AT&T never deemed **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** "perfectly acceptable," as Defendants falsely claim (at 27).

In any event, AT&T's **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** does not mean that AT&T must endure the Station Groups' misconduct **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** in 2019. That is particularly true because AT&T **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

[5] **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

[redacted] **[END HIGHLY CONFIDENTIAL] [BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

The Answer does not confront these core facts or address these violations. Instead, it attacks a strawman argument that AT&T did not make – that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** are inherently impermissible. Defendants obviously prefer to litigate a case other than the one AT&T has brought, and for good reason. As to AT&T's actual claims, they have no tenable defense.

FACTUAL BACKGROUND

A. AT&T [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]Negotiated but the Station Groups Refused To Engage

In their Answer, Defendants[6] contend that, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** "engaged in substantive, timely, and ongoing negotiations with [AT&T] over several months concerning ongoing carriage of *Defendants' stations*." Answer at 18-19 (emphasis added). The facts prove otherwise. AT&T sent multiple proposals to permit carriage of Defendants' stations, but Defendants refused to provide a response to those proposals or a proposal of their own that would have permitted carriage of their stations. **[BEGIN CONFIDENTIAL]** [redacted]

[6] Defendants assert that Deerfield Media, Inc. is not properly named because it does not "own or control any broadcast stations or licenses" for the Deerfield stations at issue. Answer at 31, ¶ 14. The Deerfield stations' websites state, however, that they are "owned and operated by Deerfield Media, Inc.," Compl. ¶ 14 & nn.15-19, and AT&T named Deerfield Media, Inc. to ensure notice, *see id.* n.20.

[redacted] **[END CONFIDENTIAL]**

[BEGIN CONFIDENTIAL] [redacted] **[END CONFIDENTIAL]** Accordingly, in March 2019, AT&T sent separate renewal proposals for **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** each Station Group to **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** *See* Answer at 9-10; Compl. ¶¶ 30-32. The Answer confirms that AT&T **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** [7]

[BEGIN CONFIDENTIAL] [redacted] **[END CONFIDENTIAL]** did not, however, provide mark-ups of the proposals for each Station Group. *See* Answer at 11; Compl. ¶ 36. AT&T's negotiators followed up on their proposals to each Station Group, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** *See* Answer at 11; Compl. ¶ 34.

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[7] *See* Answer at 10-11 (referring to "separate proposed renewal agreements," **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** citing email from AT&T "asking for the status of **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** review of the Defendant-specific agreement proposals," and referring to "revised drafts of the Defendant-specific agreement proposals") (emphasis added).

On April 19, 2019, AT&T sent **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** revised proposals for **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** each of the Station Groups. *See* Answer at 11; Compl. ¶ 37. Again, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** sent AT&T **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** but did not mark-up or respond to proposals for each Station Group. Answer at 11 (emphasis added); *see* Compl. ¶ 38. **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL] [BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL] [BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

[BEGIN CONFIDENTIAL] [redacted]

[redacted] **[END CONFIDENTIAL]**

AT&T repeatedly attempted **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** even if existing agreements expired and Defendants' stations went dark in the meantime. Thus, despite AT&T **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Defendants had not even begun negotiating deals to cover their stations as of May 30, when agreements expired and AT&T was required to stop carrying nearly all of Defendants' stations. *See* Answer at 10-13; Compl. ¶¶ 35, 37, 39, 47.[8]

On June 3, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

[8] Agreements to carry three stations at issue **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** and AT&T was forced to stop transmitting their signals, as well. *See* Answer at 13; Compl. ¶ 47.

[redacted] **[END HIGHLY CONFIDENTIAL]**[9] In response to requests for proposals **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** even as Defendants' stations remained dark. Consistent with **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** through the filing of the Complaint, the Station Groups never provided proposals or mark-ups **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** *See* Compl. ¶ 49.

Proving that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** those negotiations concluded on July 9, 2019, with execution of an agreement for AT&T to carry **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** Consistent with both AT&T's **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** understanding that they would have to negotiate separate deals for Defendants' stations, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** none of the Station Groups has reached an agreement. *See* Burakoff Supp. Decl. ¶ 2 (attached to this Reply). Indeed, the Station Groups did not even make a proposal to AT&T for more than three weeks **[BEGIN CONFIDENTIAL]** [redacted] **[END**

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[9] *Compare* Answer at 14 (for **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** (emphasis added) *with id.* (for the Station Groups: **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**; Compl. ¶¶ 48, 50-51.

CONFIDENTIAL] – a delay that is entirely inconsistent with the claim that the parties were **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** *See* Answer at 3; Burakoff Supp. Decl. ¶ 2.

B. The Station Groups' [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] AT&T Repeatedly Emphasized Was Impermissible

Defendants do not dispute the fact that they insisted upon **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Compl. ¶ 73.[10] Nor do they dispute **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** Defendants do not (and could not) claim that AT&T expressly waived these provisions.

[BEGIN CONFIDENTIAL] [redacted]

[10] Pursuant to 47 C.F.R. § 76.7(b)(2)(v), "Averments in a complaint are deemed to be admitted when not denied in the answer." Defendants' Answer to Paragraph 73 does not deny that the facts in that paragraph – including the clearly factual assertion concerning the Station Groups' plan – so they are admitted. Defendants deny the paragraph as stating legal conclusions and raising matters outside the scope of the proceeding, but those statements do not deny the facts.

[11] In their Answer to Paragraph 28, Defendants concede that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Defendants deny the allegations to the extent they are inconsistent with those documents, but Defendants never explain why AT&T's reading of those agreements is incorrect.

[redacted] **[END CONFIDENTIAL]**

Before beginning the most recent round of negotiations, by contrast, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**[12] AT&T also reiterated this point later in February, before sending any proposals **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** and on numerous other subsequent occasions. **[BEGIN CONFIDENTIAL]** [redacted]

[12] **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

[END CONFIDENTIAL] [BEGIN HIGHLY CONFIDENTIAL] [redacted] **[END HIGHLY CONFIDENTIAL] [BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

AT&T also routinely included the following notice **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL] [BEGIN CONFIDENTIAL]** [redacted]

> [redacted] **[END CONFIDENTIAL] [BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL] [BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**[13]

This course of conduct made clear that, when AT&T was negotiating **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

Notably, this message was included in, among other things, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

[13] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[redacted] **[END HIGHLY CONFIDENTIAL]**[14] Thus, contrary to Defendants' assertion (at 10, 11, 12) that AT&T **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** in fact, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

Despite these clear and consistent warnings, the Station Groups persisted in **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Compl. ¶ 69. Critically, Defendants do not deny the fact that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** *See id.* ¶¶ 51, 69.[15]

ARGUMENT

Broadcast stations are required to "negotiate in good faith the terms and conditions of retransmission consent agreements" with distributors. 47 C.F.R. § 76.65(a). The Commission has established a list of actions that violate this duty *per se*. *See id.* § 76.65(b)(1). The Commission can also find a breach of the duty "based on the totality of the circumstances of a

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[14] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[15] Defendants' Answers to Paragraphs 51 and 69 do not deny anything on factual grounds, and thus the facts in those paragraphs should be deemed admitted. *See* 47 C.F.R. § 76.7(b)(2)(v). Defendants' Argument also does not dispute that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** and instead contends that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** is either permissible or non-justiciable here. *See* Answer at 25-27, 44.

particular retransmission consent negotiation." *Id.* § 76.65(b)(2). AT&T alleged – and the undisputed facts prove – that Defendants violated their duty under both standards.

I. THE STATION GROUPS COMMITTED MULTIPLE *PER SE* VIOLATIONS BY REFUSING TO NEGOTIATE THEIR OWN DEALS AT ANY POINT BEFORE THE COMPLAINT WAS FILED

A. The Station Groups Refused To Negotiate Their Own Deals or Respond to Proposals To Permit Retransmission of Their Stations

The Commission's most fundamental *per se* rule precludes a broadcaster from refusing to negotiate. *See* 47 C.F.R. § 76.65(b)(1)(i). A related rule requires broadcasters "to respond to a retransmission consent proposal of the other party, including the reasons for the rejection of any such proposal." *Id.* § 76.65(b)(1)(v). These rules thus require broadcasters' "affirmative participation" with "the intent of reaching agreement." *Good-Faith Order* ¶¶ 40, 44.

The Station Groups have violated these rules. AT&T sent separate proposed agreements to each of the Defendants in March. Between March and the filing of this Complaint, however, the Station Groups never responded to those proposals and never provided proposals of their own to permit carriage of their stations. Indeed, they never proposed a single term concerning carriage of nearly all their stations before they went dark in May. By refusing to present AT&T with terms that would allow it to carry their stations – either by responding to AT&T's proposals or by providing proposals of their own – Defendants refused to negotiate and refused to respond to AT&T's proposals in violation of § 76.65(b)(1)(i) and (b)(1)(v).

Defendants claim that they were engaged in "ongoing negotiations with Complainants over several months concerning ongoing carriage of *Defendants'* stations." Answer at 18-19 (emphasis added). That is demonstrably false. As described above and in the Complaint, the only drafts exchanged during those months of negotiations (other than the Station Group-specific proposals AT&T sent and Defendants ignored) were, on their face, **[BEGIN CONFIDENTIAL]**

[redacted] **[END CONFIDENTIAL]** *Defendants do not dispute* that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** was the only station group listed as a party or that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** were the only ones included in the deals.[16] By its terms, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** would not have resulted in "carriage of Defendants' stations" because **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Indeed, when the parties *did* reach agreement **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Defendants' stations remained dark.

Defendants' **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** also acknowledged that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** was never intended to apply to Defendants or their stations. He acknowledged that AT&T would need to negotiate **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

Permitting broadcasters to use the mere assertion of a **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** to defer negotiations until an uncertain future event

[16] **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** The documents also speak for themselves. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

would gut the Commission's rules and enable broadcasters to avoid negotiating when they believed that suited their interests. Thus, the fact that Defendants did not have a present "intent of reaching agreement" at any time prior to execution of **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** gives rise to a *per se* violation. *Good-Faith Order* ¶ 40.[17]

B. The Station Groups Refused To Negotiate at Reasonable Times

Even if the Defendants' actions are not construed as an outright refusal to negotiate or failure to respond, they establish a *per se* violation because broadcasters must negotiate "at reasonable times" and cannot act "in a manner that unreasonably delays retransmission consent negotiations." 47 C.F.R. § 76.65(b)(1)(iii). This rule requires responses "on a timeline that is reasonable in the specific context of the negotiations at hand." Memorandum Opinion and Order, *Coastal Television Broad. Co. v. MTA Commc'ns, LLC*, 33 FCC Rcd 11025, ¶ 8 (Chief, Media Bur. 2018) ("*Coastal Television*"). The Commission further recognized that, "in many cases, time will be of the essence in retransmission consent negotiations," and advised that "we will consider the proximity of the termination of retransmission consent and the consequent service disruptions to consumers." *Good-Faith Order* ¶ 42.

Even setting aside whether a broadcaster is *ever* permitted to delay negotiations for months after receiving a proposal, the Station Groups' delay here – **[BEGIN**

[17] Defendants cite (at 23 n.98) Memorandum Opinion and Order, *HITV License Subsidiary, Inc. v. DIRECTV, LLC*, 33 FCC Rcd 1137 (Chief, Media Bur. 2018), but that case supports AT&T's position. The Commission rejected a refusal to negotiate claim because *Defendant* had already provided a proposal, and it was not obligated to provide another absent a response. The Station Groups here do not have that defense because they never provided a proposal for their stations before AT&T filed the Complaint. Moreover, the Commission recognized that "DIRECTV . . . is not obligated to negotiate against itself," *id.* ¶ 8, yet by refusing to respond to AT&T's proposals, that is exactly what the Station Groups are requiring AT&T to do here.

CONFIDENTIAL] [redacted] **[END CONFIDENTIAL]** and extending long into a blackout – is patently unreasonable given the certainty and severity of service disruptions resulting from the Station Groups' delay. It is revealing that Defendants never explain how their strategy could have resulted in the parties reaching new agreements before May 30, when existing agreements expired.[18] For this reason alone, Defendants' actions are an unreasonable delay under the Commission's rules.

Beyond that, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** – a future event that not only lacks a set date, but may never actually occur, as evidenced by the fact that many of **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** proved willing to take their stations dark – is a refusal to negotiate at reasonable times. Defendants did not act as if time was of the essence to reaching a deal, but rather as if time was immaterial. For that reason as well, the Station Groups' unreasonable delay establishes another *per se* violation.

II. THE STATION GROUPS DO NOT DISPUTE THAT THEY [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] ESTABLISHING BAD FAITH UNDER THE TOTALITY OF THE CIRCUMSTANCES

Even if the foregoing misconduct does not give rise to any *per se* violation, the Commission should find that the Station Groups violated their duty to negotiate in good faith "based on the totality of the circumstances." 47 C.F.R. § 76.65(b)(2). A party fails this test if its

[18] Defendants cite (at 23 n.98) *Coastal Television*, but the Commission in that case found no unreasonable delay because the defendant "with[e]ld making *another* counter-offer in the absence of a reply . . . to [its] reasonable inquiries." *Coastal Television* ¶ 8 (emphasis added). The Station Groups failed to make a first counteroffer on their deals (let alone "another" one), and they do not claim that their delay is excused by AT&T's failure to respond to some reasonable inquiry.

conduct "reflect[s] an absence of a sincere desire to reach an agreement that is acceptable to both parties" or is "sufficiently outrageous." *Good-Faith Order* ¶ 32.

A. Defendants' [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]

Defendants' entire strategy was premised on "outrageous" conduct. They do not dispute that their plan **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** *See supra* note 15; 47 C.F.R. § 76.7(b)(2)(v) (averments admitted if not denied). **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**[19]

Defendants' undisputed conduct runs afoul of Commission precedent, and therefore establishes bad faith under the totality-of-the-circumstances test. First, the Commission has explicitly recognized "the strong public interest in preserving the sanctity of contract." Memorandum Opinion and Order, *Ryder Commc'ns, Inc. v. AT&T Corp.*, 18 FCC Rcd 13603,

[19] **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

¶ 28 (2003). Second, the Commission has confirmed that parties **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

B. [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] Other Factors Are Within the Scope of the Totality-of-the-Circumstances Test

Defendants minimize their misconduct and refer (at 24) to AT&T's claim as "commonplace" and inviting "a back door inquiry [by the Commission] into . . . substantive terms." That characterization makes no sense. There are no substantive terms into which the Commission could inquire, through a back door or otherwise, because Defendants refused to discuss them.

Contrary to Defendants' characterization, AT&T's claim is that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Defendants correctly note (at 25 n.105) that the Commission has found a good-faith violation under the totality-of-the-circumstances test on only one prior occasion. But that is of no consequence. There is no indication the Commission has had the occasion to review

a totality claim where the defendants **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** in an attempt to gain leverage. Defendants cite no such case, and none exists. Defendants therefore cannot rely on the absence of Commission precedent.

[BEGIN CONFIDENTIAL] [redacted] **[END CONFIDENTIAL]** In any event, Defendants themselves rely heavily **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** to demonstrate that the Station Groups were allegedly negotiating. And they cite no authority for the facially illogical proposition that, under a "totality of the circumstances" test evaluating whether negotiating tactics demonstrate bad faith, the actions of one party's **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** cannot be considered.

Nor is there a basis for Defendants' purported concern (at 26) that evaluating whether **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** would require the Commission to wade into "disputes arising out of privately negotiated contracts." AT&T is not asking the Commission to enforce **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** or to adjudicate any claim under state law. Rather, AT&T is just asking the Commission to enforce its rules. AT&T's complaint is that the centerpiece of Defendants' **[BEGIN CONFIDENTIAL]**

[redacted] **[END CONFIDENTIAL]** which is an act of bad-faith negotiating, and that Defendants therefore violated the Commission's good-faith rules.

Similarly, Defendants assert (at 27) that **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** cannot be considered because Sinclair is not a party.[20] But AT&T is again not currently seeking any relief with respect to Sinclair. Rather, based on **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** these facts are relevant under the totality-of-the-circumstances test. In particular, Defendants seek (at 25) to portray themselves as "nine small station groups," such that the Commission should not "intervene" against them and in AT&T's favor. That portrayal is inaccurate given Sinclair's interests.[21]

In sum, in evaluating AT&T's totality-of-the-circumstances claim, the Commission can and should consider *all* the relevant information including the facts giving rise to AT&T's *per se*

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[20] Defendants erroneously claim (at 27) that there is no "basis whatsoever" for AT&T's claims concerning Sinclair's apparent control over Defendants. Those claims are based on (i) public statements on the Station Groups' websites for their stations, Compl. ¶¶ 23-24 (citing references to Sinclair and an example directly stating the station is "owned and operated by Sinclair"); (ii) Sinclair's public references to the stations as "our stations" in Securities and Exchange Commission filings, *id.* ¶ 25; **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** Defendants do not deny any of these allegations on factual grounds. *See* Answer at 32-33, 36, ¶¶ 23-26, 43.

[21] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

claims, *see supra* Part I, as well as facts concerning **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** The Commission should also consider the fact that the Station Groups' **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** and extract greater fees comes squarely at consumers' expense given the Station Groups' lengthy delays and the inevitable blackouts that they have caused.[22]

III. THE COMMISSION'S GOOD-FAITH RULES APPLY TO [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]

Defendants spend much of their Answer attacking an argument AT&T never made. Defendants assert (at 3, 18, 21-23) that AT&T is asking the Commission to impose a "blanket prohibition on **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** and is complaining "predominantly" about **[BEGIN CONFIDENTIAL]** [redacted] **[END**

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[22] The Station Groups have shown an alarming lack of urgency given that their stations have been dark for months. For example, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Defendants claim (at 15) that they have continued to engage in "good-faith discussions with Complainants," but **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Without accounting for their own delay, the Station Groups attempt (at 13, 28) to shift blame for disruptions to AT&T **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** For its part, consistent with negotiating each deal separately, AT&T **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

CONFIDENTIAL] the Commission has said are permissible. Not so. AT&T does not allege that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** alone establish liability on any issue.

Rather, AT&T seeks relief under the Commission's explicit rules, which apply to broadcasters whether they are negotiating individually **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Thus, whether they are negotiating individually **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** broadcasters cannot refuse to negotiate, refuse to respond to proposals, or unreasonably delay their responses. *See* 47 C.F.R. § 76.65(b). There is no **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** exception to any of those rules.

Similarly, even where there is no *per se* violation, parties allegedly engaging in **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** can also run afoul of the totality test if they engage in "outrageous" misconduct. *Good-Faith Order* ¶ 40. There is no **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** exception to the totality rules either. Thus, regardless of whether stations can negotiate **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** they cannot do so in a manner that relies on violating or interfering with a party's contractual **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** or any other bad-faith negotiating tactics. *See supra* p. 21 (citing Commission authority).

Despite acknowledging that the good-faith rules apply **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Defendants contend (at 19-20) that it would be a "direct assault on permissible **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** to sanction Defendants for failing to respond to

proposals and failing to negotiate. Defendants appear to suggest that, so long at least one station **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Defendants can indefinitely refuse to negotiate their own deals even as retransmission consent agreements expire and blackouts stretch on, and even if, as is the case here, the limited negotiations that are happening are not advancing their own deals. *See supra* Part I.A (explaining lack of actual negotiations **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

That proposition cannot be reconciled with the plain text of the good-faith rules, which require broadcasters to actually negotiate, *see* 47 C.F.R. § 76.65(b)(1)(i), or with Commission guidance confirming that negotiators must act with the intent of reaching a deal, *see Good-Faith Order* ¶ 40. A broadcaster cannot satisfy its duty **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** while everyone else **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** refuses to do so. In this regard, Defendants are correct (at 19) that AT&T is concerned with "*how*" the Station Groups are **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** negotiating (or, more accurately, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Where, as here, the Station Groups are violating numerous rules and contracts under the guise of purported **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** a good-faith Complaint is warranted.

IV. THE [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] DO NOT EXCUSE THE STATION GROUPS' BAD FAITH IN 2019

Throughout the Answer, Defendants attempt to excuse their misconduct by citing the parties' **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** They contend (at 19-21) that AT&T's *per se* claims fail because **[BEGIN CONFIDENTIAL]** [redacted]

[redacted] **[END CONFIDENTIAL]** Similarly, Defendants contend (at 26-27) that AT&T's **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** are "disingenuous" because AT&T allowed **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** But the circumstances today differ materially from those **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Most importantly, AT&T insisted on **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** *See* Burakoff Supp. Decl. ¶ 2. This meant that, in 2019, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** *See generally* Background Part B.

The fact that AT&T was insisting **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** To the contrary, the only reasonable conclusion to draw from that fact is that AT&T intended to even more vigorously protect **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

That is exactly what AT&T did, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** *See* Background Part B.

AT&T also took a variety of steps **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** *See id.* **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Defendants' assertion (at 21, 27) that AT&T "provide[s] no explanation whatsoever as to why [the Station Groups'] approach evinces bad faith now but **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** is thus disproved: the importance of **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** and the tools available to AT&T to protect it, had changed **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** which AT&T made clear to Defendants.[23] Defendants also do not cite any authority for the proposition that AT&T is *required* to explain its decision to react differently to misconduct in disconnected negotiations separated by three years. AT&T was within its rights to find the conduct unacceptable but still decide – in the interests of avoiding service disruptions, as a sign of good will, for the benefit of its customers, or for many other reasons – to proceed with those negotiations without forever prejudicing its rights and without committing to make an identical decision in 2019. AT&T's conduct **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** is legally irrelevant because AT&T's Complaint does *not* seek relief from any conduct that occurred **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** and because AT&T was transparent and forthright about its current position from the outset of the new negotiations.

[23] Defendants' contention that AT&T found Defendants' prior conduct "perfectly acceptable," Answer at 27, also misstates the relevant history between the parties. Indeed, Defendants note (at 8) that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

Further, any purported reliance based on AT&T's conduct in 2019 is contradicted by overwhelming record evidence. *See* Background Part B. The fact that AT&T agreed to **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** does not mean that AT&T "affirmatively consented to Defendants' **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Answer at 10, particularly since they were **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** To the contrary, AT&T **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** *See* Background Part B. Nor could **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** plausibly be construed as a waiver even without that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**which was reiterated with unmistakable clarity both before and after **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**[24] In

[24] The other two instances of AT&T's 2019 conduct Defendants cite (at 16, 20) do nothing to show that AT&T was willing to tolerate **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** is entirely consistent with AT&T's approach **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** are all part of the **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

applying its good-faith negotiation rules, the Commission looks to "established precedent, particularly in the field of labor law." *Good-Faith Order* ¶ 6. "[N]ational labor policy casts a wary eye on claims of waiver of statutorily protected rights." *Gannett Rochester Newspapers, a Div. of Gannett Co. v. NLRB*, 988 F.2d 198, 203 (D.C. Cir. 1993) (citation omitted). Thus, any of AT&T's rights under the good-faith rules "can be waived only if [AT&T's] waiver is 'clear and unmistakable.'" *Id.* (citation omitted); *see also Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 79-80 (1998) (holding that waiver of a statutorily protected right must be clear and unmistakable). AT&T clearly and unmistakably **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** *See Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 378-79 (D.C. Cir. 2017) (rejecting attempt by employer to claim waiver based on "failure to bring an unfair labor practice charge" in prior negotiations; "the Union's one-time failure to challenge . . . does not estop subsequent assertion of that right"; noting that the Supreme Court has held that "two instances of a union's silence did not establish a pattern of decisions clear enough to convert the union's silence into binding waiver") (citations omitted).

DEFENDANTS' AFFIRMATIVE DEFENSES SHOULD BE DISMISSED

1. Defendants' first affirmative defense – failure to state a claim – should be dismissed for the reasons set out above and in the Complaint. The record evidence proves that

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Station Group and thus present no risk of **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** *See* **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** Similarly, the fact that **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

Defendants failed to negotiate in good faith under 47 C.F.R. § 76.65(b)(i), (iii), and (v), as well as 47 C.F.R. § 76.65(b)(2).

2. Defendants' second affirmative defense – that AT&T's claims are time-barred – is frivolous.[25] The Complaint alleges claims based on misconduct that occurred in *2019*, and AT&T has one year from the date of that misconduct to file its claims. *See* 47 C.F.R. § 76.65(e)(2) (one-year period runs from date defendant "engages in retransmission consent negotiations . . . that the complainant alleges to violate one or more of the [good-faith] rules"). Defendants' contrary assertion (at 44-46) that AT&T's time to seek relief began to run **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** has no basis in fact or law. As Defendants themselves recognize (at 45), Commission precedent holds that disputes arising from renewal negotiations trigger their own one-year period, running from the date of any misconduct in the latest round of negotiations.[26] To get around this, Defendants pretend (at 45) that AT&T is seeking relief from misconduct that occurred **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** But the Complaint contains no allegations about misconduct **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** and there is no basis to treat the 2019 negotiations as part of the **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** They are distinct, as is the misconduct alleged, thereby triggering a distinct limitations period. AT&T's claims are timely and should be considered on the merits.

[25] Commission rules require that "every effort should be made to narrow the issues" in an answer. 47 C.F.R. § 76.7(b)(2)(iii).

[26] *See* Order on Reconsideration, *Implementation of the Satellite Home Viewer Improvement Act of 1999*, 16 FCC Rcd 15599, ¶ 10 (2001) ("[I]f a broadcaster and MVPD negotiate and execute a five-year retransmission consent agreement in Year 1 and subsequently commence negotiations to renew or extend such consent in Year 4, any alleged violations of the good faith requirement stemming from such Year 4 negotiations are subject to complaint for a one-year period.").

3. Defendants' third affirmative defense – equitable estoppel – should be dismissed for reasons stated in Part IV, *supra*, assuming that equitable estoppel could even preclude AT&T from making claims asserted in the Complaint. As an initial matter, by its terms, this Affirmative Defense challenges *only* AT&T's ability to argue that using a **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** in and of itself violates the good-faith obligations, *see* Answer at 46, and the examples of prior conduct on which Defendants rely show only that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** *see*, *e.g.*, *id.* at 16. AT&T's Complaint does not, however, rely on **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** in and of itself, as a basis for finding that Defendants acted in bad faith. Thus, even if AT&T is estopped from arguing that Defendants cannot **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** AT&T is not estopped from arguing **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** or otherwise violate the good-faith rules, nor is AT&T estopped from seeking relief from Defendants' continued use of a **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** who has engaged in bad faith conduct.

In any event, Defendants' estoppel argument fails. Defendants argue that they should be permitted in 2019 to rely upon AT&T's conduct during **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** and that AT&T should not be permitted to change its negotiation position this time around. But equitable estoppel has no application based on **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** over a completely separate transaction. *See Wilkes-Barre Hosp.*, 857 F.3d at 378-79; *see also* Memorandum Opinion and Order, *AirTouch Cellular v. Pacific Bell*, 16 FCC Rcd 13502, ¶ 16

(2001) (questioning whether equitable defenses are available and rejecting estoppel and waiver defenses where defendant "failed to offer any evidence that [complainant] expressly waived its right" and where complaint "states repeatedly that it did *not* waive any right").

Moreover, equitable estoppel is not an available defense to Defendants because they lack any justification for relying on AT&T's position **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** as shown in the one case they cite. The doctrine of equitable estoppel "has been used to prevent a party from taking a position that is inconsistent with earlier conduct when he was *aware* that his adversary would rely upon the prior inconsistent conduct," and, "[t]o prove a claim of equitable estoppel, the aggrieved party must show that he *justifiably* relied upon the conduct of the party sought to be estopped." Memorandum Opinion and Order, *Communique Telecommunications, Inc. d/b/a Logicall Application for Review of the Declaratory Ruling and Order Issued by the Common Carrier Bureau*, 14 FCC Rcd 13635, ¶ 29 (1999) (emphases added). AT&T commenced negotiations by explicitly and repeatedly informing Defendants that AT&T **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** As discussed, AT&T consistently applied its stated position and went so far as to send cease-and-desist letters that have now culminated in actual litigation to enforce AT&T's rights. To the extent Defendants relied on **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** rather than these explicit statements in 2019, doing so was unjustified.[27] Nor did AT&T have any way to be "aware" that Defendants would ignore what

[27] Defendants' only concrete example of supposed "reliance" – the claim (at 46-47) that they would have been less likely **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** – is contradicted by record evidence. **[BEGIN CONFIDENTIAL]** [redacted]

AT&T said and purportedly rely instead on **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** under entirely different circumstances, including the absence of **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** for each station group **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

Further, Defendants expressly disclaimed that they were in fact relying on AT&T's position to formulate their own strategy. When AT&T informed **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Defendants' claim (at 46) that negotiations were structured around AT&T's policy cannot be squared with **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Defendants thus confirmed that they acted as they did for their own reasons and that any injury they have suffered has been self-inflicted and is not "a result of Complainants' about face." Answer at 47. For this reason, too, the defense should be dismissed.

CONCLUSION

Based on the foregoing, the Commission should deny the Station Groups' affirmative defenses, find that the Station Groups failed to negotiate in good faith, and award the remedies sought in the Complaint.

[redacted] **END CONFIDENTIAL]**

Respectfully submitted,

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August 23, 2019

VERIFICATION

I, Sean A. Lev, do hereby declare and state under penalty of perjury as follows:

1. I am a Partner at Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., and Counsel for DIRECTV, LLC and AT&T Services, Inc. My business address is 1615 M Street, N.W., Suite 400, Washington, D.C. 20036.

2. I have read the foregoing Reply. To the best of my personal knowledge, information, and belief formed after reasonable inquiry, the statements made in this Reply (other than those of which official notice can be taken) are well grounded in fact and warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law. This Reply is not interposed for any improper purpose.

Sean A. Lev

August 23, 2019

SUPPLEMENTAL DECLARATION OF LINDA BURAKOFF

I, Linda Burakoff, am over the age of 18. I am a resident of the state of California. I have personal knowledge of the facts herein, and, if called as a witness, could competently testify thereto.

1. I am Vice President, Content & Programming for AT&T Mobility & Entertainment Group. In that role, I routinely oversee retransmission negotiations between various AT&T entities, including AT&T Services, Inc. and DIRECTV, LLC (collectively, "AT&T"), and broadcast stations. In particular, I have been personally involved on behalf of AT&T in the negotiations that are the subject of the foregoing Verified Complaint.
2. I have reviewed the Reply in Support of AT&T's Complaint for Defendants' Failure to Negotiate in Good Faith ("Reply"). Based on my personal knowledge, each statement in the Reply followed by a reference to this declaration is true and correct. Moreover, based on information made known to me pursuant to my duties, the remainder of the Factual Background is true and correct, as well.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 23, 2019, in California.

Linda Burakoff

CERTIFICATE OF SERVICE

I hereby certify that, on August 23, 2019, I caused a copy of two versions of the foregoing Reply – (1) the fully redacted Public Version as filed with the Commission, and (2) a version redacted to remove certain information for which AT&T has requested Commission approval to limit disclosure to the Station Groups' attorneys not participating in negotiations with AT&T (and marked "CONFIDENTIAL INFORMATION -Not for Public Inspection")- to be served upon the following entities:

Deerfield Media, Inc.
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Deerfield Media (Rochester) Licensee, LLC
Deerfield Media (San Antonio) Licensee, LLC
GoCom Media of Illinois, LLC
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HSH Myrtle Beach (WWMB) Licensee, LLC
KMTR Television, LLC
Mercury Broadcasting Company, Inc.
MPS Media of Tennessee Licensee, LLC
MPS Media of Gainesville Licensee, LLC
MPS Media of Tallahassee Licensee, LLC
MPS Media of Scranton Licensee, LLC
Nashville License Holdings, LLC
Second Generation of Iowa, LTD
Waitt Broadcasting, Inc.

via overnight delivery and via electronic mail (as designated) on those on the attached list, and/or upon the named defendants by hand delivery to their registered agents for service of process.

Matthew M. Duffy